Comments of

Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Consumer Law Center
on behalf of its low income clients
Privacy Times
and
U.S. Public Interest Research Group

to the Federal Trade Commission
Regarding

Definition of a Fair and Reasonable Fee for Credit Score Disclosure
FACTA Credit Score Fee
Project R411004
January 5, 2005
Submitted via www.regulations.gov

I. Introduction

The Consumer Federation of America[1], along with Consumer Action[2], Consumers Union[3], National Association of Consumer Advocates[4], National Consumer Law Center[5]

[1] The **Consumer Federation of America** is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[2] **Consumer Action** is a non-profit, membership-based organization that was founded in San Francisco in 1971. Since then, Consumer Action has continued to serve consumers nationwide by advancing consumer rights, referring consumers to complaint-handling agencies through our free hotline, publishing educational materials in Chinese, English, Korean, Tagalog, Russian, Vietnamese, and other languages, advocating for consumers in the media and before lawmakers, and comparing prices on credit cards, bank accounts, and long distance services.

[3] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications, and noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

[4] The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[5] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might

on behalf of its low income clients, Privacy Times[6], and U.S. Public Interest Research Group[7] appreciate the opportunity to comment on the procedure for the Federal Trade Commission to define a fair and reasonable fee for disclosure of consumers' credit scores by credit reporting agencies. The new requirement that national credit reporting agencies disclose credit scores upon the request of consumers has the potential to greatly expand consumer knowledge about their credit scores, make credit reports more easily understandable and increase the effectiveness of the Fair Credit Reporting Act.

These comments will expand upon three concepts:

- The fair and reasonable fee must be set at the lowest level possible to provide the greatest possible consumer access to information about credit scores.

- The prices charged in the existing market for credit scores should not be the basis for the Commission's definition of a fair and reasonable fee.

- The Commission should define a fair and reasonable fee based on the cost of providing credit scores incurred by the credit reporting agencies, information about which is available in the public domain.

II. The intent of the credit score disclosure provision in the Fair and Accurate Credit Transactions Act (FACTA) was to increase consumer access to information that determines whether consumers will be granted credit and how much they will have to pay for such credit. The definition of a fair and reasonable fee must first and foremost serve this objective.

Under section 212(b) of title II of the Fair and Accurate Credit Transactions Act, the FTC is required to establish the definition of a fair and reasonable fee that consumer reporting agencies are allowed to charge for disclosure of a consumer's credit score. The title of this section, "Improvements in use of and consumer access to credit information," should provide primary guidance in the setting this definition. As the title indicates, the legislation is meant to improve consumer access to credit information, including credit scores, and recognizes that the current access provided in the marketplace is insufficient.

Access to credit scores is vital to the overall effectiveness of credit reporting law. The FCRA puts the burden on consumers to fix problems in credit reports. Credit scores

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have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements.

[6] **Privacy Times** is a newsletter based in the Washington, D.C. area published since 1981 covering a wide range of privacy and information law subjects, including the Fair Credit Reporting Act.

[7] The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

allow consumers a vital tool for deciphering their credit reports and can help them evaluate whether their reports need fixing. Over the past several years, lenders and other businesses have increasingly relied on credit scores to evaluate credit reports, rather than conducting exhaustive reviews of the information in credit reports. Increasing access to credit scores under FACTA would give consumers some of the same advantages in understanding credit reports that businesses have received for years.

Consumers who have seen their credit scores have greater understanding of credit[8]. The disclosures Congress required through FACTA also serve an educational purpose by providing basic information about credit scores to consumers when they exercise their right to see their scores. The Advance Notice of Proposed Rulemaking expresses concern about a low fee leading to degraded quality, service, or innovation in the credit score field. It is our belief that the objective of the credit score disclosure provision was to ensure that the broadest possible segment of the population had at least basic information about their credit scores outlined by Congress. Establishing a very low allowable fee that encourages more consumers to obtain this basic information will be more beneficial than setting a higher allowable fee that provides slightly more information to a much smaller number of consumers.

We reiterate that the express intent of this provision of FACTA was to increase consumer access to information that Congress deemed to be extremely important, and that the information required to accompany a credit score was spelled out in detail. The Commission should set the allowable fee as low as allowed under the statute to ensure that the greatest number of consumers will learn about the basic information Congress intended them to see. With that basic level of information provided, both the CRAs and the unregulated sellers of credit scores can compete for the business of the more savvy consumers who wish to purchase additional services not required by law such as simulations or monitoring services. As long as those products do not have the effect of misinforming consumers about the scores they have a right to see for the established fee, that innovation should be allowed to continue and will allow regulated sellers to compete with unregulated sellers.

III. The current market prices paid by consumers for credit scores do not satisfy the FACTA requirement that credit scores be made available at a fair and reasonable fee.

The allowable fee should be set at a level that would allow a consumer to educate him or herself about their credit ratings at each of the three national CRAs. Because the information in each CRA's files can differ dramatically[9], and consumers do not know which CRA's report a business will evaluate, most experts, and the CRAs themselves, recommend that consumers review all three credit reports. Currently, for a consumer to obtain a credit score based on each of their three credit reports would cost $34.90 ($14.95

[8] See "Most Consumers do not Understand Credit Scores According to a new Comprehensive Survey," Consumer Federation of America and Providian Press Release. September 21, 2004.

[9] See *Credit Score Accuracy and Implications for Consumers.* Consumer Federation of America and National Credit Reporting Association. December 2002.

at Equifax, $14.95 at Transunion, and $5.00 at Experian). This price would not include a copy of the consumer's credit reports from any of the three CRAs. A couple preparing to apply for a mortgage would have to spend double that amount to educate themselves.

In the Advance Notice of Proposed Rulemaking, the Commission proposed a number of options for determining what a fair and reasonable fee should be. One option discussed at length in that ANPR was the option to use the current prices paid by consumers for credit scores as a basis for the fair and reasonable fee. If the FTC adopts such a status quo standard, and simply adds its imprimatur to the current market prices, they will be acting against the legislative intent to "improve" access to credit information under that title.

If Congress had been content to let the market determine the cost of the disclosure required under law, they could have simply noted that credit reporting agencies could charge "a fee" for the disclosure. The very inclusion of the words "fair and reasonable" indicates that Congress was not satisfied with the existing market forces, and wished to improve consumer access by ensuring that excessive fees were not charged.

In fact, government intervention was the key to giving consumers access to credit scores, not market forces. The very existence of a market for credit scores is the direct result of legislative action, not free market innovation. Until 2000, consumers had no legal right to see their credit scores, and companies that developed credit scores regularly included contractual clauses that forbid the disclosure of credit scores to consumers. One lender who tried to attract customers by providing consumers with their credit scores was punished for its actions by having its supply to credit scores cut off.[10] The forces of the marketplace failed to inform and protect consumers. After the high profile battle over E-Loan's disclosing scores to consumers, the California state legislature passed legislation that gave California consumers the right to see their credit scores. After this requirement, credit reporting agencies and score developers began to sell scores to consumers, and reaped significant financial benefit. In just a few short years, sales of credit scores to consumers have become a substantial revenue stream. The Commission must recognize when setting the allowable fee that the market will not necessarily serve the intent of Congress to guarantee and improve access to credit scores.

The allowable fee set by the Commission should be fair and reasonable to consumers purchasing the scores. As noted above, the provision is included in title II, which aims to increase consumer access to credit information. The standard of fair and reasonable must apply to the consumer, as indicated by Congress through the title of this section, which defines the objective as increased consumer access to information, rather than increased or continued access by CRAs to profits from sales to consumers of vital information about themselves. Unfortunately, the proposed rule offers only passing consideration of increasing access for consumers to credit scores. Instead the commission gives priority to questions that relate to the costs of CRAs and the burdens on companies.

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[10] For further description, see *Credit Scores and Credit Reports: How The System Really Works, What You Can Do*. Privacy Times 2004, pages 12-13

Furthermore, the existing marketplace for credit scores contains significant distortions that make the current prices paid by consumers unreliable measures of what consumers would consider to be a fair and reasonable fee for the disclosure of credit scores required by FACTA. The Commission has requested comment on whether there is reason to believe that the fees being charged consumers for credit scores today are not fair and reasonable. Existing market irregularities give ample reason to believe that the fees being charged should not be the basis for determining what is fair and reasonable. There is a distinct lack of consumer knowledge about credit scores which inhibits the ability of consumers who are considering purchasing their score to accurately place a value on the product, and the prevailing price is not at a level that encourages widespread review of credit scores. Furthermore there are different fees charged to different segments of the market that imply that the fees are set in an arbitrary way.

- **Most consumers do not understand that they have more than one score.** Therefore, the prices being paid in the marketplace are not a good representation of what consumers are willing to pay for information. Only a minority understand that to be fully informed about their credit scores, they would have to purchase more than one score. A recent survey revealed that 43% of consumers believe there is only one score for each consumer and an additional 14% do not know if they have one or more scores. Only 43% understood that consumers have more than one score. Even among college educated consumers, the majority thought consumers had only one score, or didn't know if consumers had more than one score. Fewer than one in four consumers with less than a high school diploma knew that consumers had more than one score.[11] The price consumers are willing to pay for a score in the current marketplace should at most be interpreted as the price that those consumers who opt to purchase a score would pay for all scores relevant to them.

- **Many consumers assume that the score they see is the same score a lender would see.** When consumers purchase a credit score, they are seeking information about how a lender will interpret their credit report. Much of the consumer education that has occurred since consumers gained access to credit scores has focused on the fact that lenders use scores to approve, deny, and price credit. The three credit reporting agencies provide educational information on their websites that stresses the fact that a credit score is used by lenders to evaluate creditworthiness. But the scores currently being sold to consumers in the marketplace are often not those widely used by lenders. Instead they are estimates or educational scores. While disclosing such scores would fulfill the credit reporting agencies' obligations under FACTA, consumer purchases based incomplete or inaccurate assumptions in the current marketplace should not be used to set the definition of a fair and reasonable fee.

[11] See "Most Consumers do not Understand Credit Scores According to a new Comprehensive Survey", Consumer Federation of America and Providian. Press Release. September 21, 2004. When consumers were asked to identify whether the statement: "Those with a credit score have only one score" was true or false, 43% correctly identified the statement as false, whereas 43% said it was true, and 14% said they didn't know. Fewer than half (48%) of college educated consumers correctly identified the statement as false, 37% said it was true, and 15% said they didn't know. Among those with less than a high school diploma, only 23% correctly identified the statement as false, 63% said it was true and 14% said they didn't know.

Information on the websites of the three CRAs does little to help consumers differentiate between educational scores and scores that lenders use in underwriting. In fact, each of the three national CRAs include information on their web sites that is likely to make consumers believe that credit scores by definition are scores that a lender would use.

Below are some examples of statements from the web sites of the three national credit reporting agencies that define credit scores as the scores used by lenders (with emphasis added):

From Experian's website:

> What is a credit score?
> A credit score is **a number lenders use** to help them decide: "If I give this person a loan or credit card, how likely is that I will get paid back on time?"[12]

From Equifax's website:

> What is a credit score?
> A credit score is a rating **used by a lender** to help determine whether you qualify for a particular credit card, loan, or service. [13]

From TransUnion's website:

> How are credit scores used?
> Credit scores are one of the primary **tools a creditor uses** when determining the risk in lending money to you. **Creditors use scores**, among other things, to determine whether or not to grant you credit and, if so, how much credit and at what rate. Creditors will also access and consider your credit report, which can provide further substantiation on a given component of a score that could affect their final decision. However, as most credit decisions are made very quickly, it is a credit score that is most often used.[14]

Thus, the price paid by consumers likely reflects the price they are willing to pay for the score a lender would use in underwriting – a far superior product than the educational score permitted under the statute. Current prices are unreliable measures of what consumers consider fair and reasonable because they are based on limited consumer understanding about the product they are purchasing.

Congress recognized the probability of confusion between educational scores and credit scores a lender would use for underwriting when it required CRAs to provide a statement regarding that difference. The Commission should clarify this protective

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[12] http://www.experian.com/consumer_online_products/credit_score.html
[13] https://www.econsumer.equifax.com/consumer/sitepage.ehtml?forward=elearning_credit21
[14] http://www.transunion.com/content/page.jsp?id=/personalsolutions/general/data/ConsumerScores.xml

measure and require more specific and prominent disclosure of the limitations of any educational score sold by a CRA. This will help reduce the incentive to deceive consumers about the nature of the score they are receiving which might discourage other entities from providing a more precise and relevant score elsewhere. Consumers would be best served by information that tells them what percentage of creditors use the score that they are purchasing, such as the following information currently on the Equifax website "You have more than one score. The most commonly used credit score is a FICO® credit score, used by over 70% of the nation's creditors to make financial decisions about consumers. To learn more about FICO® scores, visit About FICO® Scores. Want to Know Your Score? Score Power® provides you with your current FICO® credit score and a copy of your Equifax Credit Report™."[15]

- **The current market is the result of companies withholding scores from consumers for years.** Those consumers who are already aware of harm or most fearful of harm from errors or identity theft are likely to be current customers. Given the newness of this market, the prices early adopters are willing to pay should not be used to determine what is a statutorily mandated definition of fair and reasonable.

- The current price being charged in California and Colorado where law permits a "reasonable" fee has been set unilaterally by the providers, and has not been tested for reasonableness. This should not be a basis for what is considered fair and reasonable nationally.

- **In the current market, consumers generally have been able to purchase scores only when bundled with other products, primarily with credit reports.** Under FACTA, consumers will be able to purchase their credit scores as free standing products. The dynamics of the previous marketplace may not be reliable indicators of consumer behavior in the new marketplace. For example, freestanding credit scores that do not allow consumers to examine the underlying credit reports to learn more about what determined their score may be of less value to consumers.

- **Consumer reporting agencies charge varying amounts for credit scores when selling them to consumers, lenders, and resellers indicating that the market reflects arbitrary pricing and profit taking that should not be the basis for a fair and reasonable standard.**

  For example, Trans Union was charging a reseller in the Midwest $2.30 each credit report, or $4.60 for a married couple's report, plus 70 cents for a credit score, if he pulled fewer than 500 credit reports per month. But Trans Union offered a commercial bank, which happened to be a customer of the reseller, a rate of $1.60 per individual report, $3.20 for a husband-wife report and 40 cents for a credit score, if they pulled fewer than 1,500 reports per month.

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[15] https://www.econsumer.equifax.com/consumer/sitepage.ehtml?forward=elearning_credit21

According to a September 2003 report by the American Antitrust Institute (AAI), a California reseller was approached by a home-equity lender about purchasing 10,000 single-bureau reports per month. The cost to the reseller was $1.75 for each report, plus 50 cents for the credit score, or $2.25. The reseller offered the reports to the home-equity lender at $2.50 apiece—a 25-cent markup. Equifax contacted the home-equity lender directly and offered to sell its reports for $1.90 a piece.

A Massachusetts reseller who bought 3,000-4,000 Equifax reports per month paid $1.70 per report and 35 cents per credit score. Equifax offered to provide credit reports and credit scores to one of the reseller's bank customers for a combined price of $1.30—even though the bank's volume was only 100-300 reports per month.
A Florida reseller discovered that Experian's exclusive affiliate for the State of Florida, Credit Data Services, Inc., offered one of the reseller's customers a merged Equifax/Experian report for $1.50—less than half the reseller's wholesale cost for a two-bureau report.

Moreover, Equifax and Trans Union have "dramatically" jacked the prices they charge resellers for re-scoring. In 2000, the charge was $5.00-$7.00 per tradeline. In 2001, within 60 days of each other, they hiked the price to $15.00-$30.00 per trade line. Meanwhile, Trans Union and Equifax, through their mortgage reporting subsidiaries, continued offering lenders re-scoring services at $5.00-$7.00 per trade line.[16]

IV. The Commission should refer to the current actual cost for national CRAs to purchase scores, rather than the price charged to consumers after markup, when determining an allowable fee. This fee should be established as a maximum fee, with an annual adjustment for inflation.

Allowing CRAs to charge a fee to consumers set at or just above the actual cost of purchasing or generating the score and delivering it to consumers would serve the primary objective of the credit score disclosure provision – to increase consumer access to credit information. CRAs purchase scores for very low cost, and information about this cost is in the public domain. Even low volume purchasers of credit scores used by lenders for underwriting purchase them for less than a dollar per score. The American Antitrust Institute report cites purchase prices as low as twenty five cents per score for a high volume purchaser of scores and reports[17]. The cost of generating an educational score that will likely be slightly less rigorous than a score used by lenders will likely be even lower than these costs.

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[16] Jonathan L. Rubin and Albert A. Foer, "Competitive Conditions in the Mortgage Credit Reporting Industry: A Report By the American Antitrust Institute (AAI)., September 8, 2003. See the full report at http://www.ncrainc.org/documents/Attach%2002%20-%20AAI%20Report%20-%20Sept%2003.pdf, and discussion at *Credit Scores and Credit Reports: How The System Really Works, What You Can Do*. Privacy Times 2004, pages 57-58

[17] Ibid.

The Commission should verify the actual costs of producing educational scores when setting the allowable fee, but based on the information available to us, and reasonable estimates, **we believe the maximum allowable fee should be in the range of $1.00 - $1.50** per credit score. We base this estimate on the fact that high volume purchasers of underwriter quality scores can obtain scores for twenty five cents. As noted above, the score required under FACTA is likely to be much less costly to produce and will be of less value to consumers than a score that a lender would use. Allowing thirty-seven cents for postage in what is likely to be the most expensive delivery mechanism, plus some production costs associated with printing the information required to accompany the score, and recognizing that there may be some additional costs we have not taken into consideration, this range is very reasonable.

The maximum allowable fee, based on the current cost to purchase credit scores, and adjusted based on a standard measure of inflation. This approach is already familiar to the companies involved, as they had been required to sell consumers copies of their credit reports at a set price adjusted in such a fashion. The Commission expresses concerns about the possibility of a fee becoming obsolete because of, for example, changes in the cost of delivery of credit scores in the future, but also cites a desire not to create a time consumer process to review the allowable fee. In the case of credit reports, the Commission periodically adjusted the price CRAs were allowed to charge for credit reports based on the Consumer Price Index. The Commission should establish the lowest possible fee, taking into consideration the current costs for obtaining scores, bearing in mind that the scores CRAs will provide under the statute will likely not be of the same quality, and make future adjustments based on the Consumer Price Index.

V. Conclusion

Credit scores are used by an increasing number of businesses to determine whether to provide goods and services to consumers and at what price. Access to information about credit scores is vital for consumers to be able to understand how they will be evaluated. We believe that if the Commission sets an allowable fee at the level we recommend, this provision of FACTA will do much to educate consumers about how various actions have affected and will affect the prices they pay in the marketplace for a wide variety of goods and services.

We thank you for the opportunity to provide input on this important matter.